Supreme Court, U.S.
FILED
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CLERK

No. 95-508

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

ROBERT W. KEARNS,

Petitioner,

v.

CHRYSLER MOTORS CORPORATION,
AMERICAN MOTORS CORPORATION,
KLH, PROFESSIONAL CORPORATION,
REED, SMITH, SHAW AND MCCLAY, P.C.,
ARNOLD, WHITE & DURKEE, CORPORATION,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

REPLY BRIEF TO ARNOLD, WHITE & DURKEE CORPORATION'S OPPOSITION TO CERTIORARI

ROBERT W. KEARNS, PH.D.
Manufacturing-Inventor
Petitioner pro se
301 Houghton Laboratory Lane
Queenstown, Maryland 21658
(410) 827-9337

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Arguments first raised in the Brief in Opposition

p. 1: "protracted patent litigation"

Meaning Kearns would not settle all his remaining infringement cases after *Ford* for money, under his contingency agreement, as AW&DC insisted he do - saying Dr. Kearns and the public were not entitled to equitable relief under 35 U.S. Code § 283. Moreover, to settle would mean Dr. Kearns giving up:

1) his Constitutional standard of compensation for his 21 U.S. IWWS patents ,namely, the Art. I § 8 cl 8: "securing for limited times to ... inventors the exclusive right to their ... discoveries;"
2) his manufacturing plant (see CAFC Appendix Vol. 3);
3) his fellow citizens jobs in expanding USA foreign trade.

p. 2: "every Kearns patent involved expired before September 1988."

(See Reply Brief appendix [Reply A-1] from the sixth infringement chart Dr. Kearns submitted to the District Court officials identifying General Motors Corp.'s infringement of his U.S. patents.) The facts of the 'routine life' of the '936, '603, '698 and '059 are:

3,796,936 Windshield Wiper Control Device
Filed: Dec. 15, '72
Issued: Mar. 12, '74
'routine life' expires: **Mar. 11, '91**

3,728,603 Windshield Wiper Control
Filed: Oct. 27, '70
Issued: Apr. 17, '73
'routine life' expires: **Apr. 16, '90**

4,339,698 Control Apparatus for Windshield Wiper System
Filed: Apr. 12, '79
Issued: Jul. 13, '82
'routine life' expires: **Jul. 12, '99**

4,494,059 Structure for and Method of Surface Condition Sensing and Indicating and Motor Speed Control
Filed: Jan. 9, '80
Issued: Jan. 15, '85
'routine life' expires: **Jan. 14, '02**

Thus, AW&DC's statement "expired before September 1988" in support of denying this Petition is **not true** as the four patents against GM demonstrate. AW&DC emphasize that Dr. Kearns is proceeding *pro se*. In contrast former Chief Circuit

Judge Howard T. Markey of the Court of Appeals for the Federal Circuit wrote to Dr. Kearns' son, Dennis [Reply A-2]:

> "Congratulations on your recent victory in the United States Supreme Court. A *Pro Se* triumph in our land's highest court is a rare event and in itself a historic event. Having worked hard to return the patent law to following the statute, the result is heart-warming. I look forward to visiting with both of you in the future."

The recommendation of Dr. Kearns' doctoral Professor Mergler [Reply A-3] is also germane.

Arguments first raised in the Brief in Opposition

STATEMENT OF THE CASE

p. 2: AW&D served as counsel to Dr. Kearns in a bellwether case ..."

The *Ford* case was not a "bellwether" case as seen by the extensive infringement by GM in [Reply A-4]. Dr. Kearns required additional drawings from GM to go beyond this sixth chart of GM infringement to reduce the number of claims at trial. The District Court dismissed *Kearns* v. *GM*. The supervision of the Supreme Court is required for equity on equity and to learn of the deficiencies in the Fed. R. Civ. P. which lead to the punishment of the inventor of a successful product such as the Intermittent Windshield Wiper System ("IWWS").

p. 2: "until one week before trial"

Dr. Kearns was forced to discharge AW&DC as they were prepared to sign a Pretrial Order which did not contain a claim for equitable relief under 35 U.S. Code § 283 to secure a remedy for himself and the public under 35 U.S. Code § 281.

p. 2: "discharged that firm"

The record shows that RSSM withdrew over Dr. Kearns' objections and after Dr. Kearns agreed to the $500,000 deposit proffered by the District Court to have RSSM finish the case. After RSSM voluntarily withdrew, Dr. Kearns conducted the damages phase trial *pro se* and the jury awarded three times the $/infringement of *Ford*.

p. 2: "This petition follows certain ancillary proceedings" says AW&DC!"

For the District Court to be said by the Opposition to have conducted "ancillary proceedings" is to confirm the need for Dr. Kearns' Petition to this Supreme Court to be granted. For the District Court to have conducted "ancillary proceedings" it is required that the District Court have jurisdiction of the principal case. Wright, *Federal Courts*, § 9 (4th ed. 1983); *Scuteri, et al.* v. *Estate of Philip Revitz, et al.*, 829 F.Supp. 387 (S.D. Fla. 1993). "Cross-claims, impleader of third parties, interpleader, and intervention as of right are further examples of ancillary jurisdiction (requiring jurisdiction of the principal case). Wright, *supra* § 9. Without jurisdiction and intervention, ancillary jurisdiction does not exist, *Fulton National Bank of Atlanta* v. *Hozier*, 267 U.S. 276, 280 (1925). Intervention is also a requirement that the District Court failed. *Fulton*, *supra*, requires both for jurisdiction. The lack of intervention is discussed herein at p. 8.

From the Overview (Pet. p. 1), it can be readily seen that jurisdiction was transferred to the CAFC on 29 June '93 and from the CAFC jurisdiction was passed to the Supreme Court. Thus, the proceedings identified as "ancillary" were not ancillary at all due to lack of jurisdiction of the principal case which had passed to the CAFC and from there passed on to the Supreme Court. The "ancillary" proceedings discussed by AW&DC in their Brief in Opposition are exactly the actions that are not permissible in Federal Courts under the District Court's condition at the time and are now appealed by Dr. Kearns to the Supreme Court. *See*, [Pet. p. 25].

Upon the Supreme Court acting there was nothing for the District Court to do but carry out the mandate of the Supreme

Court[1] which was to comply with the District Court's Final Judgment of 28 October 1992 which confirmed pay all the Supersedeas Bond amount to Dr. Robert W. Kearns. As Dr. Kearns concludes in his Petition on p. 30:

> "The District Court's Order of 12 April '95 distributing the funds is void. Dr. Kearns' Complaint to the District Court for Maryland is released for action."

p. 3: "Those proceedings concluded the merits litigation in the Chrysler case."

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[1] See Docket Event 752 of April 17, '95 (but note not ANSWER!) ROBERT KEARNS' OBJECTIONS & OPPOSITION TO CHRYSLER'S CROSS-COMPLAINT AND THIRD PARTY COMPLAINT FOR INTERPLEADER, DECLARATORY AND INJUNCTIVE RELIEF

[T]his Court does not have personal jurisdiction of the parties in this case. ... Chrysler Corp. has not filed a separate action to seek its relief. Chrysler Corp.'s present filing was improper because their suit, *Kearns* v. *Chrysler Corporation*, is over except for the limited purpose of executing the terms of the final judgment upheld by the Court of Appeals for the Federal Circuit with *certiorari denied* by the Supreme Court. ... 2. A Court does not have authority after a final judgment to take action not authorized by that final judgment. A Court must execute the judgment as it is written, cannot act to modify the terms of the judgment, and, cannot act in some other manner not authorized by the judgment itself. Both the Supersedeas Bond and the Final Judgment affirmed by the Court of Appeals for the Federal Circuit with certiorari denied by the Supreme Court require Chrysler Corp. to pay the full amount to Robert W. Kearns. 3. An inferior court has no power or authority to deviate from the mandate issued by an appellate court. *Jewelers Vigilance Committee, Inc.* v. *Ullenberg Corp.*, 853 F.2d 888 (Fed. Cir. 1988) citing at n. 3 *Briggs* v. *Pennsylvania R.R.*, 334 U.S. 304, 306, 68 S.Ct. 1039, 1040, 92 L.Ed. 1403 (1948) (quoted with approval in *Northern Helex Co.* v. *United States*, 634 F.2d 557, 560, 225 Ct.Cl. 194 (1980). Under 28 U.S.C. § 1291, the Court of Appeals has jurisdiction only from *final* decisions of the United States District Courts. A Judgment is final for purposes of appeal when it terminates all issues presented in the litigation on the merits and leaves nothing to be done except to enforce by execution what has been determined. *Donovan* v. *Hayden Stone, Inc.*, 434 F.2d 619, 620 (6th Cir., 1970) citing *Heike* v. *United States*, 217 U.S. 423, 429, 30 S.Ct. 539, 54 L.ed. 821; *St. Louis, Iron Mountain & S. R.R. Co. v. Southern Express Co.*, 108 U.S. 24, 28, 2 S.Ct. 6, 27 L.Ed. 638; *City of Louisa* v. *Levi*, 140 F.2d 512 (6th Cir.).

Not so. The CAFC admitted the Chrysler action had matters pending at that time:

> "The main portion of the Chrysler case was before this court (CAFC) in appeal no. 93-1450, -1470, which was decided on August 11, 1994. Still pending before the United States District Court for the Eastern District of Michigan at that time were ...[2]."

A proceeding eligible for adjudication was Docket Event #652 entered on 16 June '93, — Dr. Kearns' GATT Uruguay Round paper. The District Court momentarily said, no jurisdiction, (Docket Event #653) during the day of 29 June '93. The no jurisdiction was not appealable at that time since the jurisdiction of the Judiciary was not final as Congress had not yet decided to enter the GATT Treaty under consideration.

The CAFC did not have jurisdiction over the appeal of Dr. Kearns' GATT Uruguay Round paper in 1994 either as the CAFC has jurisdiction under 28 U.S.C. § 1295 only of **final** decisions and the decision by Congress whether to enter the GATT Treaty was not final until 1995.

In transmitting the proposed GATT Treaty legislation to Congress on 27 September 1994, President Clinton said[3],

> "The leaders of every major industialized nation have pledged to take action so that the Uruguay Round Agreements can be implemented by January 1, 1995."

That date was met.

As the record shows, Chrysler's own actions kept the *Kearns* v. *Chrysler Corp. and American Motors Corp.* Civil Action No. 82-70748 continuing. That Chrysler overt action was the filing by Chrysler, under Civil Action No. 82-70748, its Cross-Complaint and Third Party Complaint for Interpleader, Declaratory and Injunctive Relief.

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[2]See footnote 1 of O R D E R in CAFC No. 95-1016 Pet. A-9.

[3]House Document 103-316, Vol. 1 p. (1) 103d Congress, 2d Session.

AW&DC admit in their Opposition p. 5:

> "The only aspect of the proceedings related to the *Chrysler* case that can possibly be addressed by this petition is the Federal Circuit's dismissal of Dr. Kearns' latest appeal (No. 95-1334) of the district court's grant of Chrysler's supplemental request for interpleader relief."

But those 'proceedings ... for interpleader relief' kept the Civil No. 82-70748 time open into 1995 wherein the GATT Treaty became effective U.S. law. Thus, AW&DC admit the Judicial *time* of Civil Action No. 82-70748 was extended for the Judiciary to consider Dr. Kearns' GATT Uruguay Round paper filed during the time before jurisdiction was passed to the appellate courts. The jurisdiction of the Judiciary over the GATT Treaty is now **final** and eligible for appellate relief.

p. 3: "AW&D and RSS&M each moved independently to recover their attorneys' fees from Dr. Kearns."

RSSM filed an independent action complaint in the U.S. District Court for the District of Columbia (Washington) before District Judge Norma Holloway Johnson, Civil Action No. 92-0501, a jury trial, in which Dr. Kearns was granted a specific counter-claim against RSSM to be heard by a jury. That case was transferred to Detroit's District Judge Cohn, Civil Action No. 2:93-CV-74013 where it is still pending.

See, Pet. pp. xi & 26.

AW&DC appealed the dismissal with prejudice of their attorneys' fees motion in ¶ 6 of the Final Judgment, see Overview Pet. p. 2, (Docket Event #662) which appeal (#93-1468) was dismissed by the CAFC (Docket Event #683). While AW&DC have received $6.5 million of the $10.7 disbursed to others, patent law is Federal law. Federal law is to use the law of the State in which the action occurred. Here the action occurred in Detroit, Michigan. In Michigan, there is no statutory law governing attorneys' liens, so they rest entirely upon the common law. *Bruce* v. *U.S.*, 1955, 127 F.Supp. 858. Dr.

Kearns discharged AW&DC prior to their planned meeting to sign a Pretrial Order with Chrysler lawyers that did not contain his claim for equitable relief under 35 U.S. Code § 283 and sought only money damages under 35 U.S. Code § 284. Michigan law is given in *Ambrose* v. *Detroit Edison*, 237 N.W.2d 520, 524 (C.A. Mich. 1975)

> 'The right to discharge is of little value if the client must risk paying the full contract price for services not rendered upon a determination by a court that the discharge was without legal cause. The client may frequently be forced to choose between continuing the employment of an attorney in whom he has lost faith, or risk the payment of double contingent fees equal to the greater portion of any amount eventually recovered. ... The uncertain position of the client in such circumstances is illustrated by the record in the present case where the trial court found the discharge was without cause and this court has made a contrary finding and concluded the discharge was justified. Unless a rule is adopted allowing an attorney as full compensation the reasonable value of services rendered to the time of discharge, clients will often feel required to continue in their service attorneys in whose integrity, judgment or capacity they have lost confidence.' We agree with the reasoning and adopt the rule here, that "trial court improperly impressed lien for contingent fee percentage rather than for quantum meruit of services rendered." Remanded.

Returning to the situation of RSSM to apply Michigan law even though the pending case including Dr. Kearns' counterclaim is dominant. Michigan law applicable to RSSM is given in *Miles* v. *Krainik*, 167 N.W.2d 479 (C.A. Mich., 1969) where there is cited with approval:

> "The law creates the lien of an attorney upon the judgment or fund resulting from his services. *Wipfler* v. *Warren* (1910), 163 Mich. 189, 194, 128 N.W. 178; *Shank* v. *Lippman* (1931), 253 Mich. 451, 235 N.W. 216.

In the RSSM situation, they voluntarily withdrew after Dr. Kearns agreed to meet the $500,000 deposit proffered by District Court Cohn for RSSM to complete the damage phase

of the trial. Dr. Kearns, *pro se*, years later secured the money fund now disbursed. Thus under Michigan Law RSSM have no lien upon the fund. An attorney who withdraws from a suit without cause loses his inchoate right to a lien on the ultimate recovery. *Ambrose* v. *Detroit Edison Co.*, 1975, 237 N.W.2d 520 (C.A. Mich. 1975).

p. 3: "That appeal (CAFC No. 95-1016) was dismissed ..."

Article III limits the role of the federal courts to adjudication of actual "cases" and "controversies." *Allen* v. *Wright*, 468 U.S. 737, 750 (1984). Standing is one element of the case or controversy requirement, *id.*, and a requirement for appellate jurisdiction. From Dr. Kearns' Overview (Pet. p. 1) AW&DC appealed the dismissal of their claim to the CAFC (Docket Event #662) which was subsequently dismissed by the CAFC (Docket Event #683). RSSM did not appeal the dismissal of their 'notice' of charging lien (Docket Event #465), nor did Phyllis Kearns appeal her 'claim' (Docket Event #171). AW&DC's and RSSM's Notice of Appearance, under the local rules became ineffective. KLH, P.C., Phyllis Kearns, and Vincent Barker never filed Notice of Appearance. Thus AW&DC, RSSM, KLH, P.C., Vincent Barker and Phyllis Kearns lack standing before the court. To acquire standing, the procedure is to use Fed. R. Civ. P. Rule 24. None of these entities sought to intervene. The entities lack standing. The District Court lacked jurisdiction beyond 29 June '93 as seen in the Overview. Without jurisdiction and intervention, ancillary jurisdiction does not exist, *Fulton National Bank of Atlanta* v. *Hozier*, 267 U.S. 276, 280 (1925) so the cases and controversy requirement of Const. Article III were not met which is a requirement for the distribution of funds in the non-ancillary proceeding held without District Court jurisdiction. Dr. Kearns' GATT Uruguay paper meets Art. III.

CAFC appeal No. 95-1016, is void *ab initio* and has no effect

on this Petition as those not served therein had no standing. The Argument section is covered by the law already cited. No jurisdiction, no parties, no intervention, outside Michigan law, are adequate reasons p. 6: "to alter the District Court's allocation of the deposited funds."

Arguments first raised in the Brief in Opposition

CONCLUSION

p. 7: The issues raised do not effect a large number of litigants;

p.5: The proceedings were "reasonable, fair, and correct";

p. 7: The appeal was "meritless and misfocused."

The issues of parties and jurisdiction have a considerable effect on all litigants and particularly those inventors who are encouraged by 28 U.S. Code § 1654 to appear *pro se* in their technical cases which now cost, on average, $3.5 million. Trial lawyers acquire 'conflicts' and usually are not trained in technical graduate schools. Entities steal the inventions inventors work to manufacture, and when seen on the market other entities steal "to meet the competition." Are Dr. Kearns' successful invention acts — resulting in 43 defendants - to be "promoted" under Art. I § 8 cl 8 or "punished" with multiple trials? Do the Fed. R. Civ. P. address this problem — particularly when the 'life' of the "limited times" are not recognized by the Court and criminal cases are given priority? The Court's lack of examination of the issues raised by Kearns directly effect every inventor and further reverberate as job loss throughout American society. The Court has an opportunity in this Petition to examine and reflect upon the respective value of innovation and the obligation of the federal judicial system to secure[4] and protect those rights in 35 U.S. C. § 281

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[4] securing is a Constitutional requirement Art. I § 8 cl 8.

civil actions that are to end in a 'remedy' for patent infringement. Is money a 'remedy' for stealing patented inventions? If so, why doesn't 35 U.S.C. contain a compulsory license section as does the Canada patent system? The answer is that Congress rejected a compulsory license section in the patent law twice. [Pet. pp. Hearings at xi & 8.] Rather than addressing the merits of the issues presented by Kearns, AW&DC asserts, conclusively in p. 5, that the results were "reasonable, fair, and correct" in defense of: abandoning its ethical obligation to zealously represent Kearns; litigating against its former client; and following a dubious judicial path to $6.5 million for itself. AW&DC cites no authority to justify the District Court and CAFC practices — including departures from Michigan law. Because federal courts are of limited jurisdiction, not only parties but the court itself has a duty, responsibility and obligation to independently confirm its authority.

Thus, Dr. Kearns' Petition for Writ of Certiorari should go forward in keeping with the words of Harry H. Wellington, Sterling Professor of Law at Yale Law School[5]:

> "I assert what the Court at times seems to deny; not only do other institutions, groups and individuals interpret the Constitution, but sometimes they have an obligation to contest both the Court's readings and its authoritativeness. While this obligation is being discharged, we have noisy dialogue. I see this as necessary. The consequences of dialogue helps fit the regulation that results from adjudication into the democratic ideology that we profess as a nation."

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[5] *Interpreting the Constitution*, 'The Supreme Court and the Process of Adjudication,' by Harry H. Wellington from the Contemporary Law Series, Yale University Press, New Haven & London.

GM INFRINGES CLAIMS:

Kearns \ GM	GM10007 Delco #1	GM10008 Delco #2	GM10015 Delco #3	Trial Candidate?	VALID?
'836	1	1			
	12	12			
	14	14		14	14
		15			
	16*	16*	16*	16*	16
'374	1				
	2				
	3				
	4				
	6*				
	7			6*	6
		7			
		8			
		9			
		10			
	11	11		11	1
		12			
		13			
		14			
		15			
		16			
		17			
'747	16	16	16	16	16
'178	1	1	1		
	2	2			
	3	3	3		
	4	4	4		
	5	5			
	6*	6*	6*	6*	6
	7	7	7		
'790			14*	14*	14
'936	1	1?	1	1	1
'090	Is it true, there are no non-depressed park IWWSs for GM?				
'603	1	1		1	1
'698	4	4	4	4	4
	6	6	6	6	6
'159	1	1			
	2	2			
	3	3		3	3
'059			10	10	

THE JOHN MARSHALL LAW SCHOOL
315 South Plymouth Court Chicago, Illinois 60604
Telephone: 312-427-2737 Facsimile: 427-8307

OFFICE OF THE DEAN

April 5, 1995

Mr. Dennis M. Kearns
The Phoenix Group
300 E. Maple, Suite 270
Birmingham, MI 48009

Dear Mr. Kearns:

I was pleased to have met you and your father, Robert, at the Lemelson event at the Smithsonian last week.

Congratulations on your recent victory in the United States Supreme Court. A Pro Se triumph in our land's highest court is a rare event and in itself a historic event. Having worked hard to return the patent law to following the statute, the result is heart-warming. I look forward to visiting with both of you in the future.

Sincerely,

S./

Howard T. Markey
Dean Emeritus

HTM:m

CASE WESTERN RESERVE UNIVERSITY

3 April 1993

Dean James F. Forsyth
Assistant Dean for Admission and
Registration
University of Maryland School of Law
500 West Baltimore Street
Baltimore, MD 21201-1786

Dear Dean Forsyth:

I write to support the application for admission to the University of Maryland School of Law of Dr. Robert W. Kearns. I have written hundreds of letters with varying degrees of enthusiasm for my undergraduate and graduate students during my thirty-five years at Case. **This letter is the most important endorsement I have ever written!**

Robert Kearns was my Ph.D. student at Case Institute of Technology (now Case-Western Reserve University) from January 1961 until June 1964. He came to Case following nine years experience as a researcher at the Bendix Research Laboratories and as a faculty member in the School of Engineering of Wayne State University. His research was extremely creative, productive, and executed with a self-directed maturity not usually found in the typically-younger graduate student.

I have fifty-six of my graduate Ph.D. students in major research institutions such as Bell Laboratories, IBM, Hewlett-Packard and at major universities such as MIT, Harvard, Stanford, Cal Tech, and Berkley. I place Robert Kearns at the very top of this group of outstanding professionals

for he not only has the intellectual powers of the very best, but in addition he has a profound sense of mission and unswerving dedication to his personal moral code.

Robert Kearns' reasons for attending law school go far beyond his personal experiences with the courts and the U.S. patent system; he has experienced the paid, the frustration, the inequity, and finally the victory of his principles and he genuinely wants to gain the knowledge and credentials to permit him to help rectify the legal deficiencies that have hurt him and others so gravely.

I give him my highest recommendation for admission to your School of Law.

Sincerely,

S./

H.W. Mergler
Leonard Case Professor of
Electrical Engineering, Emeritus

Department of Electrical Engineering and Applied Physics